

STATE OF MICHIGAN  
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

\* \* \* \* \*

In the matter of the application and complaint of	)	
<b>WESTPHALIA TELEPHONE COMPANY</b> and	)	
<b>GREAT LAKES COMNET, INC.</b> , against	)	Case No. U-17619
<b>AT&amp;T CORP.</b>	)	
_____	)	

At the November 7, 2016 meeting of the Michigan Public Service Commission in Lansing,  
Michigan.

PRESENT: Hon. Sally A. Talberg, Chairman  
Hon. Norman J. Saari, Commissioner  
Hon. Rachael A. Eubanks, Commissioner

**ORDER**

**Procedural History**

On May 13, 2014, Westphalia Telephone Company (WTC) and Great Lakes Comnet, Inc. (GLC) (collectively, complainants) filed a complaint against AT&T Corp. (AT&T) alleging breach of tariff, and breach of implied-in-fact and implied-in-law contracts. Pursuant to the requirements of the Michigan Telecommunications Act (MTA), MCL 484.2101 *et seq.*, the parties engaged in alternative dispute resolution in July 2014. On July 24, 2014, AT&T filed an answer, affirmative defenses, and counterclaims alleging violation of MCL 484.2310(2).

A prehearing conference was held on July 30, 2014, before Administrative Law Judge Suzanne D. Sonneborn (ALJ), and the Commission Staff (Staff) participated. On November 24, 2014, the parties stipulated to a 210-day schedule. MCL 484.2203(11). On December 11, 2014, the ALJ issued a Proposal for Decision.

On January 27, 2015, the Commission issued an order finding in favor of complainants, and directing AT&T to pay amounts billed pursuant to lawful tariffs for intrastate switched access service, along with associated interest and late fees (January 27 order). AT&T appealed the January 27 order to the Michigan Court of Appeals. On September 6, 2016, the Court of Appeals issued a decision vacating the January 27 order and remanding this proceeding to the Commission (September 6 order). *Westphalia Telephone Co v AT&T Corp*, unpublished opinion per curiam of the Court of Appeals, issued September 6, 2016 (Docket No. 326100). No party appealed the September 6 order.

### Background

Switched access service (SAS) charges are a form of intercarrier compensation. Interstate SAS charges are governed by the Federal Communications Commission (FCC); intrastate charges are governed by the state regulatory body. 47 USC 152(b); 47 CFR 61.26; MCL 484.2310. Section 310(2) of the MTA provides that “a provider of toll access services shall set the rates for intrastate switched toll access services at rates that do not exceed the rates allowed for the same interstate services by the federal government.” Certain rates allowed by the federal government for interstate SAS are prescribed in 47 CFR 61.26, but those rates only apply to competitive local exchange carriers (CLECs).

In this case, complainants seek to enforce the terms of GLC’s intrastate access tariff, MPSC No. 25(R), and the Michigan Exchange Carriers Association tariff MPSC No. 25(U), to recover tariffed, billed intrastate SAS charges that have been withheld by AT&T for intrastate calls routed by a third-party carrier, Local Exchange Carriers of Michigan, Inc. (LECMI), to GLC’s access tandem switch located in Westphalia, Michigan. GLC and WTC are intermediate carriers who provide a link between the long distance company, AT&T, and the local telephone companies

from/to which AT&T wishes to receive/send calls. WTC also acted as the biller in this case; WTC aggregated the information from GLC and LECMI for purposes of billing AT&T for access service, pursuant to the relevant tariffs and a common industry practice known as the carrier access billing system, which allows for multi-party billing.

In its counter complaint, AT&T alleges that complainants overcharged for SAS in violation of Michigan law by charging intrastate rates that violate MCL 484.2310. AT&T and the complainants are in a similar dispute regarding interstate charges before the FCC.<sup>1</sup> AT&T asks the Commission to issue an order finding that complainants' charges for intrastate SAS violate Michigan law, and requiring complainants to refund AT&T for the excessive charges.

In response to the counterclaims, complainants assert that the FCC's rule capping certain charges does not apply to GLC because GLC is not a CLEC.

In the January 27 order, the Commission found that GLC is not a CLEC for purposes of the caps imposed by 47 CFR 61.26, because it does not provide service to end users. With regard to end office switching charges wrongfully imposed by LECMI (and billed to AT&T by WTC), the Commission found that it was unable to order LECMI to provide a credit to AT&T because LECMI is not a party to this proceeding.

### Discussion

This case turns, primarily, on whether GLC is a non-rural CLEC (rural CLECs are not subject to the caps in the federal regulation). In the January 27 order, the Commission found that GLC is not a CLEC. On March 18, 2015, in the federal action brought by AT&T against complainants, the FCC issued a memorandum opinion and order addressing interstate rates, wherein the FCC

---

<sup>1</sup> AT&T did not make LECMI a party to its counter-complaint in this case, but did make LECMI a party to its federal complaint.

found that GLC is a CLEC for purposes of 47 CFR 61.26. *In re AT&T Services Inc and AT&T Corp v Great Lakes Comnet, Inc and Westphalia Telephone Co*, FCC 15-31 (rel'd March 18, 2015).

Complainants appealed the FCC's decision, and on May 24, 2016, the U.S. Court of Appeals for the D.C. Circuit issued a decision affirming the FCC's determination that GLC is a CLEC, and remanding the proceeding to the FCC for additional findings regarding whether GLC is a rural CLEC. *Great Lakes Comnet, Inc v FCC*, 823 F3d 998 (CA DC, 2016).

Noting these intervening federal decisions, the Michigan Court of Appeals found as follows:

On appeal, AT&T argues that because federal courts of appeal have exclusive jurisdiction to determine the validity of all final FCC orders, [28 USC 2342\(1\)](#), this Court cannot determine that the FCC's decision is invalid. We agree, vacate the PSC's order, and remand this matter to the PSC for reconsideration in light of the decisions of the FCC and the DC Circuit. . . . [A]fter the PSC entered its order, the FCC entered its decision in which it held that GLC was a CLEC for purposes of [47 CFR 61.26](#). The FCC found, based on its determination that GLC was a CLEC, that the interstate rates charged by GLC and WTC were unlawfully high. The DC Circuit affirmed the PSC's [sic] decision. The FCC's decision directly contradicts the conclusion on which the PSC based its decision, and thus calls into question the PSC's finding that complainants' intrastate rates, which matched the interstate rates, were lawful.

The PSC has no authority to pass on the validity of an FCC decision. The federal courts of appeal have exclusive jurisdiction to determine the validity of all final FCC orders. [28 USC 2342\(1\)](#). At this juncture, the PSC's interpretation of [47 CFR 61.26](#) contradicts that of the FCC; furthermore, the PSC's decision is based on an interpretation of [47 CFR 61.26](#) that the FCC has ruled is erroneous. Had the PSC interpreted [47 CFR 61.26](#) in the same manner as did the FCC, it is very likely that the PSC would have reached the opposite conclusion. Accordingly, we vacate the PSC's decision and remand this matter to allow the PSC to reconsider its decision in light of the decisions of the FCC and the DC Circuit.

September 6 order, p. 7. The Court also remanded the issue of whether LECMI or WTC must issue a refund to AT&T under the multi-party billing agreement, stating "On remand, the PSC shall determine the scope of WTC's liability based on the multi-party contract, i.e., determine whether WTC has an independent duty under the multi-party agreement to reimburse AT&T for the amounts improperly charged by LECMI regardless of whether LECMI consents to cover the

reimbursement.” *Id.*, p. 8. Finally, the Court lifted the stay it had previously imposed on the January 27 order.

The Commission finds it inadvisable to commence the remand at this time.

First, on January 25, 2016, GLC filed for bankruptcy protection under Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court, Western District of Michigan (Case No. 16-00290). In light of this filing, claims such as those brought by GLC may be (and counterclaims such as those brought by AT&T are) automatically stayed from further action by the Commission due to the automatic stay provisions of federal bankruptcy law. 11 USC 362(a).<sup>2</sup> On March 10, 2016, U.S. Bankruptcy Judge John T. Gregg entered an *Order Granting Stipulation Resolving Motion of AT&T Corp. to Determine Automatic Stay Inapplicable, Or, in the Alternative, for Relief From the Automatic Stay*, Case No. 16-00290, filed March 10, 2016, docket # 0233 (March 10 order). That order directs that “to the extent, if any, that the automatic stay applies to the Regulatory Proceedings, the stay is modified to allow the appeals related to the Regulatory Proceedings, including the appellate proceedings currently pending before the Michigan Court of Appeals (Case No. 326100) and the United States Court of Appeals for the District of Columbia Circuit (Case No. 15-1064), to proceed to conclusion, *provided however*, that nothing herein shall permit, as part of such proceedings, the liquidation of the amount of damages or claims by AT&T against the Debtors.” March 10 order, p. 2. The Debtors include GLC. The bar date for creditor claims was July 25, 2016 (AT&T filed timely claims against GLC), and the bankruptcy proceeding is ongoing. The appeals have concluded, and no new order has been issued from Judge Gregg allowing for remands to proceed. Thus, the automatic stay is in place.

---

<sup>2</sup> The Commission notes that this is not a proceeding brought by a governmental unit to enforce its regulatory powers, which would be exempt from the automatic stay under 11 USC 362(b)(4).

Second, whether GLC is a rural CLEC is a potentially decisive issue, which is currently on remand to the FCC. With respect to the January 27 order, the Commission was subject to a 210-day deadline and did not have the luxury of waiting for the FCC to resolve the CLEC issue. Now, however, the Commission is under no such deadline and may wait for the FCC to decide whether GLC is a rural CLEC and thus not subject to the caps imposed in 47 CFR 61.26.

The Commission will issue further orders after the case before the FCC has been concluded, and the bankruptcy is either concluded or the Bankruptcy Court has lifted the automatic stay.

THEREFORE, IT IS ORDERED that the Commission will take up the remand of this matter after the related action before the Federal Communications Commission is concluded, and the bankruptcy proceeding filed by Great Lakes Comnet, Inc., is either concluded or the automatic stay in that proceeding is lifted for the purpose of allowing the remand to proceed.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so by the filing of a claim of appeal in the Michigan Court of Appeals within 30 days of the issuance of this order, under MCL 484.2203(12). To comply with the Michigan Rules of Court's requirement to notify the Commission of an appeal, appellants shall send required notices to both the Commission's Executive Secretary and to the Commission's Legal Counsel. Electronic notifications should be sent to the Executive Secretary at [mpscedockets@michigan.gov](mailto:mpscedockets@michigan.gov) and to the Michigan Department of the Attorney General - Public Service Division at [pungpl@michigan.gov](mailto:pungpl@michigan.gov). In lieu of electronic submissions, paper copies of such notifications may be sent to the Executive Secretary and the Attorney General - Public Service Division at 7109 W. Saginaw Hwy., Lansing, MI 48917.

MICHIGAN PUBLIC SERVICE COMMISSION

---

Sally A. Talberg, Chairman

---

Norman J. Saari, Commissioner

---

Rachael A. Eubanks, Commissioner

By its action of November 7, 2016.

---

Kavita Kale, Executive Secretary